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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 61

JOHN HUGHES AND LOUIS RICHARDSON,
Petitioners,

against

SUPERIOR COURT IN AND FOR THE COUNTY OF CONTRA COSTA,
Respondent.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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IN THE

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OCTOBER TERM, 1949

No. 361

JOHN HUGHES and LOUIS RICHARDSON,
Petitioners,

against

SUPERIOR COURT IN AND FOR THE COUNTY OF CONTRA COSTA,
Respondent.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Introductory Statement

This brief, *amicus curiae*, is filed by the American Civil Liberties Union, a nationwide organization of individuals interested in protecting the rights of Americans by legal action and in other appropriate ways. It has filed this brief because it believes that the injunction involved represents an unwarranted invasion by the State of California upon the right of free speech as protected by the First and Fourteenth Amendments of the Constitution.

At the outset we wish to state that we condemn the purpose of the picketing herein. We nevertheless feel that its advocacy by picketing is constitutionally protected as an exercise of free speech. The purpose of the picketing to us is distasteful; to others, it may seem otherwise. In any event, it is legal. However misguided the theories of petitioners, their picketing must fall of its own weight. That is of the very essence of free speech.

POINT I

The injunction violates the free speech guarantees of the Constitution.

A. The picketing in this case is protected by the First and Fourteenth Amendments.

This Court has clearly established the proposition that the First and Fourteenth Amendments protect the speech elements in picketing from interference by the State unless "clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." *Thornhill* v. *Alabama*, 310 U. S. 88, 104-105. *Accord: Cafeteria Employees Union, Local 302* v. *Angelos*, 320 U. S. 293; *Bakery and Pastry Drivers Local* v. *Wohl*, 315 U. S. 769; *Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287; *Carlson* v. *California*, 310 U. S. 106; *Senn* v. *Tile Layers' Union*, 301 U. S. 468.

Although picketing may cause injury to economic interests, such injury by itself is an insufficient basis for

restricting its exercise. This Court stated in *American Federation of Labor* v. *Swing*, 312 U. S. 321, at 326:

> "The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. *Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interest against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's Case.* 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 478 . . . ." (Italics supplied.)

Likewise it stated in *Thornhill* v. *Alabama*, 310 U. S. 88, 104-5,

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to

> test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

It is apparent that the reason for protecting picketing is to enable the facts of a controversy to be brought to the public's attention. Consequently, where there is a legitimate dispute it can make little difference whether a labor union as such is involved. Rather, the right to communicate the facts of a dispute exists, the right not being lost because a labor dispute is involved.

> "The constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved, * * * or because the communication takes the form of picketing, even when the communication does not concern a dispute between an employer and those directly employed by him." (*Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, 725.)

In *Bakery and Pastry Drivers Local* v. *Wohl*, 315 U. S. 769, the Court again pointed out that a technical labor dispute was not required in order for a party with a legitimate grievance to make known to the public the facts of such grievance, stating at p. 774:

> "So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a

> determination that such a dispute was not involved. Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

Both Congress and this Court have recognized that a substantial interest exists in members of a racial group (Negroes) picketing to compel the hiring of Negro personnel. In *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, the Court, in holding that the Norris-La Guardia Act applied to Negroes picketing to compel an employer to take on Negro personnel, alluded to this, stating at 561-562:

> "The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation.
>
> * * *
>
> "The legislative history of the act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that act. It was intended that peaceful and

> orderly dissemination of information by those defined as persons interested in a labor dispute concerning 'terms and conditions of employment' in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices."

Thus, picketing is protected under the First and Fourteenth Amendments where there exists a legitimate dispute and the picketing is for the purpose of bringing to the attention of the public the facts of such dispute and enlisting its sympathy and support. In the instant case there is such a dispute and such an attempt to enlist public aid and support, bringing the picketing within the protection of the First and Fourteenth Amendments, protecting it from interference by the State unless the State is regulating some peculiarity of picketing which makes it more subject to regulation than speech, or unless the regulation would be upheld as a regulation of speech.

B. Only the speech components of picketing are here involved.

There are, of course, certain non-speech characteristics in picketing which may subject it to special regulation. It will be here demonstrated, however, that only the free speech components of picketing are involved in this case and that, consequently, the regulation thereof must be judged solely as a regulation of speech.

The elements differentiating picketing from speech were defined by Mr. Justice Douglas as follows:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 769, 776-777 (concurring opinion).

Accordingly the Court has allowed picketing to be regulated so as (i) to prevent violence (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies, supra*, 312 U. S. 287; see *Cafeteria Employees Union, Local 302* v. *Angelos, supra*, 320 U. S. 293), and (ii) to prevent the conscription of neutrals in industrial conflicts (*Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722).

It is to be noted in the instant case that neither the place nor the manner nor any other element peculiar to picketing was enjoined. The injunction prohibited *all*

> "picketing or taking position in front of any of the places of business of Lucky Stores, Incorporated, for the purpose of compelling * * * [Lucky Stores, Incorporated, hereinafter termed 'Lucky'] to do any of the following acts:
>
> (1) the selective hiring of Negro clerks, such hiring to be based on the proportion of white and Negro customers who patronize * * * [Lucky's] stores."

On its face* the injunction is aimed solely at the objectives of the picketing.** It prohibits nothing but the ideas advocated and must, therefore, be taken as a restraint on the advocacy in general of the prohibited purposes.

The facts in the case also make it clear that the injunction dealt with no element peculiar to picketing but solely with a regulation of the purposes of the picketing. The picketing was confined to not more than six pickets patrolling an area more than 100 feet wide. The pickets were peaceful. There was no violence and no comments were made to customers or employees other than those on the placards carried which bore the following legend:

> "Lucky Won't Hire Negro Clerks In Proportion to Negro Trade—Don't Patronize."

Clearly, therefore, the manner of the picketing was lawful and the picketing was confined to the immediate area of the industrial dispute.

Thus the injunction on its face and as applied, prohibited picketing which was peaceful, not *en masse*, with

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* It is well established that the injunction must be judged on its face. *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Thornhill* v. *U. S.*, 310 U. S. 88. See Note 61, Harv. L. Rev. 1208. No attempt is made to elaborate upon this point, however, since it can be easily demonstrated that, as applied the injunction is likewise merely a regulation of speech.

** The Court below apparently recognized this. It stated:

> "The controlling issue is whether the sole objective involved the discriminatory hiring of a fixed proportion of Negro employees regardless of all other considerations is lawful. Relative to this issue it is to be particularly noted that here the only activity enjoined is 'picketing * * * for the purpose of compelling * * * [Lucky] to * * * [engage in] the selective hiring of Negro clerks * * * based on the proportion of white and Negro customers who patronize * * * [Lucky's] stores.'" 198 P. (2d) 885, 886 (1948).

concededly accurate and truthful banners and in the immediate area of the industrial dispute. There can be no doubt, therefore, that the sole problem involved is whether the advocacy of the objective or purpose sought by the picketing may be restrained by the Court irrespective of the form which such advocacy takes. Thus, it becomes impossible to distinguish between the validity of an injunction against advertising, speaking or distributing leaflets in order to accomplish the enjoined purpose and picketing to accomplish the enjoined purpose.

The test which must be applied, therefore, becomes solely that which this Court applies to restrictions on speech generally:

> "[The restriction] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissable limitation." *Thomas* v. *Collins*, 323 U. S. 516, 530.

Accord: Winters v. *New York*, 333 U. S. 507; *Board of Education* v. *Barnette*, 319 U. S. 624, 639; and cases cited in fn. 14, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287 (dissenting opinion).

C. The picketing in the instant case presents no clear and present danger of a substantive evil.

It may be conceded for the purposes of this case that a clear and present danger of a substantive evil of such

magnitude that the State could prevent would be created by the advocacy of immediate, direct violation of valid laws or of valid common law policies of the State.* The Supreme Court of the State of California rested its opinion solely on this ground and held that the purposes of the picketing were unlawful. Such a determination is, however, not controlling in this Court which may reexamine State determinations of both fact and law where Federal Constitutional sanctions may be evaded thereby.** An examination of the law of the State of California will reveal clearly that the purposes of the picketing were not in fact unlawful, but merely represented ideas which the California Court found undesirable.

Regrettably, there is no statute in California making discrimination unlawful. California does not have a Fair Employment Practices Act, nor any statute making discrimination in favor of or against Negroes unlawful. There is, furthermore, no indication in the majority opinion of the California Court that the common law policy of the State prohibits discrimination. In fact, though this precise point was brought to the attention of the Court by the dissenting opinion of Mr. Justice Traynor, the majority nowhere indicated that the common law policy of the State prohibited discrimination.

Rather, the majority opinion bases its finding on the case of *James* v. *Marinship Corp.*, 25 Cal. (2d) 721, stating that in this case it had held that a closed shop coupled with a closed union was illegal and that the objective of the picketing in the instant case was to produce but a

* Cf., *Gibonev* v. *Empire Storage*, 336 U. S. 490; *Allan-Bradley Co.* v. *Local Union*, 325 U. S. 797.

** "But we do not have revisory power over State practice, *provided such practice is not used to evade constitutional guaranties.*" *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 296. (Italics supplied.)

species of closed shop with a closed union. The power of the State to regulate a closed shop with a closed union or either of them is not here involved. But neither of these results could possibly be the objective of the picketing herein. There is no organized labor group in the picture, thus eliminating any problem raised by an organized monopoly in the labor field and exclusion of Negroes by such organized monopoly. The Court in the *Marinship* case was dealing with the elimination of a precise evil. It outlawed discrimination in a very narrow area, in no way including or protecting Negroes against economic abuse by employers because of race or creed. The problem in the instant case on the other hand is one where the objective of the picketing is legal, but the advocacy of such objectives by picketing is judicially outlawed. Such must necessarily be proscribed by the First Amendment. To hold otherwise would be to hold that the mere advocacy of a distasteful lawful objective represents a clear and present danger of a substantive evil to the State. That such can constitute such a danger to the functions of the State is difficult to conceive.

The injunction represents merely an expression by the Courts of the State of California of disapproval of the objectives sought by the picketing—the ideas advocated. Upholding the injunction would represent a holding that the Court could prevent all picketing unless it found its purpose desirable. Thus judges could determine whether picketing to urge the upgrading of Negroes be allowed, whether picketing to force the hiring of additional Negro personnel be enjoined, and whether picketing to enforce an FEPC law should be prevented. This Court has recently reiterated that this could not be allowed consistently with the guarantees of free speech:

> "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist; nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." (*Duplex Printing Co. v. Deering*, 254 U. S. 443, 488 (dissenting opinion) quoted with approval in *Gibonev v. Empire Storage & Ice Co.*, 336 U. S. 490, 499.)

It is respectfully submitted that the injunction is clearly an unconstitutional curtailment of the right of free speech and expression and this Court should, therefore, hold that such injunction is invalid.

CONCLUSION

The injunction being an unconstitutional denial of the petitioners' rights of free speech, the judgment of the court below should be reversed and the injunction vacated.

Respectfully submitted,

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